

# LEGAL PROTECTION OF COMMERCIAL SECRETS IN THE EU: NEW REGULATION - NEW CHALLENGES

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## ABSTRACT

**Finding** – Trade secrets are one of the most commonly used forms of protection of intellectual creation and innovative know-how by businesses, yet at the same time they are the least protected by the existing Union legal framework against their unlawful acquisition, use or disclosure by other parties. Until June 1, 2018, the member states committed themselves to transposing the Directive (EU) 2016/943<sup>145</sup> of the European Parliament and of the Council of 8 June 2016 into national law, which is providing for minimum standards for the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure (further - Directive). This Directive has a considerable impact on the legal regulation of Member States in this area since the level of legal protection of undisclosed know-how and business information (trade secrets) is different in the Member States. It should be noted that the Directive must be applied in conjunction with the provisions of the Agreement on Trade Related Aspects of Intellectual Property Rights (further – TRIPS)<sup>146</sup> Agreement, which provides the protection of trade secrets.

**Purpose** - The purpose of this research work is to assess the level of legal protection of undisclosed know-how and business information (trade secrets) both until the transposition of the directive into national law of the Member States and after this transposition.

It should be noted that the Directive does not specify the impact that it should have on the regulation of criminal law in the Member States that have criminalized the

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<sup>145</sup> Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure; source:

<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32016L0943&qid=1513590519612&from=EN>

<sup>146</sup> Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS); source: [https://www.wto.org/english/docs\\_e/legal\\_e/27-trips.pdf](https://www.wto.org/english/docs_e/legal_e/27-trips.pdf)

forms of obtaining, disclosing or using the undisclosed know-how and business information (trade secrets).

Therefore, the research work will also focus on the impact of the Directive to content and interpretation of commercial spying and other offenses related to undisclosed know-how and business information (trade secrets).

**Methodology** – The article will be written applying the teleological, systemic, linguistic, logical, historical and comparative methods.

**Implications** – The study will assess the effectiveness of the Directive and the quality of the transposition of the Directive. Also, it will help to submit proposals for improvement of the legal regulation in this area.

**Keywords:** criminal responsibility, intellectual property, commercial spying, commercial, trade secret, industrial property.

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Before analyzing the EU regulations related to commercial secrets and their disposal, should pay attention to the importance of the issue, which is due to illustrate the European Union Intellectual Property Office: *“When dealing with trade secrets, the main purpose of the Member States’ (MSs) legislators has been to protect business secrets, but also to address other interests, such as openness and freedom of information. The balance between these interests relies on the one hand in providing the protection that companies need to be able to continue their research and development without the risk of misappropriation of valuable innovative knowledge, and on the other hand in securing interest in a transparent society with a great exchange of information.”*<sup>147</sup>

Illegal acts *inter alia* criminal offenses related to commercial secrets (criminal disclosure of commercial secrets, commercial espionage, etc.) are manifestations of unfair competition law.

The primary law of the EU does not deal directly with the rules on protection against unfair competition, although the general prohibition of unfair competition can be seen in the preamble to the Treaty establishing the European Community and in Article 3 (1) (g). In addition, the provisions of Articles 28 and 49 of the Treaty establishing the European Community which preclude States from applying protection against unfair

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<sup>147</sup> The baseline of trade secrets litigation in the eu member states: European Union Intellectual Property Office, 2018; source:

[https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document\\_library/observatory/documents/reports/2018\\_Baseline\\_of\\_Trade\\_Secrets\\_Litigations\\_in\\_EU\\_Member\\_States/2018\\_Baseline\\_of\\_Trade\\_Secrets\\_Litigations\\_in\\_EU\\_Member\\_States\\_EN.pdf](https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/reports/2018_Baseline_of_Trade_Secrets_Litigations_in_EU_Member_States/2018_Baseline_of_Trade_Secrets_Litigations_in_EU_Member_States_EN.pdf)

competition in a way that would hinder the free movement of goods and services between Member States are relevant to national law.<sup>148</sup>

Therefore, the legal protection of commercial secrets should be regulated in such a way that it does not interfere with the actual business relationship, providing only the minimum necessary legal protection to the owner of the trade secret.

The Directive is perhaps the only document intended to protect exclusively commercial secrets throughout the European Union. Given that the deadline for transposition of the Directive only expired on 1 June 2018, it is not possible to assess the effectiveness of the transposition legal mechanisms chosen by the Member States. But it is clear that the directive clearly demonstrates the strengthening of the protection of intellectual property in the field of industrial property, which is indicative of a trend towards promoting responsible and fair business creation.

It should be noted that given the fact that in most European Union countries is provided criminal liability for business-related criminal offenses, the Directive is a significant source of law in the application and interpretation of the criminal law in the countries of the European Union.

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As mentioned above, unlawful inter alia criminal offenses related to commercial secrets (criminal disclosure of commercial secrets, commercial espionage, etc.) are manifestations of unfair competition. It shows the importance of international (regional) regulation. Both directly or indirectly (through the general prohibition of unfair competition) the protection of commercial secrets is governed by the following international regulations:

Article 10bis [Unfair Competition] of Paris Convention for the Protection of Industrial Property<sup>149</sup> states, that: „(1) *The countries of the Union are bound to assure to nationals of such countries effective protection against unfair competition. (2) Any act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition. (3) The following in particular shall be prohibited: 1. all acts of such a nature as to create confusion by any means whatever with the establishment, the goods, or the industrial or commercial activities, of a competitor; 2. false allegations in the course of trade of such a nature as to discredit the establishment, the goods, or the industrial or commercial activities, of a*

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<sup>148</sup> Ramūnas Birštonas, Danguolė Klimkevičiūtė, Nijolė Janina Matulevičienė, Lina Mickienė, Jūratė Usonienė. *Intelektinės nuosavybės teisė (en. Intellectual property law)*. Vilnius: Mykolas Romeris University, 2011

<sup>149</sup> United International Bureaux for the Protection of Intellectual Property (BIRPI). 1968. Paris Convention for the Protection of Industrial Property of March 20, 1883, as revised at Brussels on December 14, 1900, at Washington on June 2, 1911, at the Hague on November 6, 1925, at London on June 2, 1934, at Lisbon on October 31, 1958, and at Stockholm on July 14, 1967. Geneva: United International Bureaux for the Protection of Intellectual Property (BIRPI).

competitor; 3. indications or allegations the use of which in the course of trade is liable to mislead the public as to the nature, the manufacturing process, the characteristics, the suitability for their purpose, or the quantity, of the goods.”<sup>150</sup>

Therefore, the Paris Convention for the Protection of Industrial Property establishes a general prohibition of unfair competition, further distinguishing individual aspects. *Expresis verbis* protection of commercial secrets is not mentioned.

Another international law that already regulates the *expresis verbis*, the protection of trade secrets is TRIPS. Unlike the Paris Convention for the Protection of Industrial Property, the TRIPS Agreement governs two cases which may be related to unfair competition law, the protection of geographical indications (Article 22) and the protection of trade secrets (Article 39 of Section 7 [Protection of disclosed information] which states that: „1 . In the course of ensuring effective protection against unfair competition as provided in Article 10bis of the Paris Convention (1967), Members shall protect undisclosed information in accordance with paragraph 2 and data submitted to governments or governmental agencies in accordance with paragraph 3.

2. Natural and legal persons shall have the possibility of preventing information lawfully within their control from being disclosed to, acquired by, or used by others without their consent in a manner contrary to honest commercial practices (\*) so long as such information: (a) is secret in the sense that it is not', as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question; (b) has commercial value because it is secret; and (c) has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret.

3. Members, when requiring, as a condition of approving the marketing of pharmaceutical or of agricultural chemical products which utilize new chemical entities, the submission of undisclosed test or other data, the origination of which involves a considerable effort, shall protect such data against unfair commercial use. In addition, Members shall protect such data against disclosure, except where necessary to protect the public, or unless steps are taken to ensure that the data are protected against unfair commercial use.”)

As mentioned in primary EU law, protection from unfair competition is not directly regulated, although the general prohibition of unfair competition can be seen in the preamble to the Treaty establishing the European Community and in Article 3 (1) (g).

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<sup>150</sup> United International Bureaux for the Protection of Intellectual Property (BIRPI). 1968. Paris Convention for the Protection of Industrial Property of March 20, 1883, as revised at Brussels on December 14, 1900, at Washington on June 2, 1911, at the Hague on November 6, 1925, at London on June 2, 1934, at Lisbon on October 31, 1958, and at Stockholm on July 14, 1967. Geneva: United International Bureaux for the Protection of Intellectual Property (BIRPI).

In addition, the provisions of Articles 28 and 49 of the Treaty establishing the European Community which preclude States from applying protection against unfair competition in a way that would hinder the free movement of goods and services between Member States are relevant to national law.<sup>151</sup>

It should be noted that the regulation of commercial secrets in European Union law before the Directive is rather fragmented and abstract (only through the prism of unfair competition protection). It does not create preconditions for the formation of equal level protection of commercial secrets in the European Union. The following is a list of EU legislation in the field of analysis:

- Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising;
- Directive 97/55/EC of European Parliament and of the Council of 6 October 1997 amending Directive 84/450/EEC concerning misleading advertising so as to include comparative advertising;
- Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by Law, Regulation or Administrative Action in Member States concerning the pursuit of television broadcasting activities;
- Directive 2000/13/EC of the European Parliament and of the Council of 20 March 2000 on the approximation of the laws of the Member States relating to the labelling, presentation and advertising of foodstuffs;
- Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council ('Unfair Commercial Practices Directive').

The Directive will be analyzed further in the context of criminal law.

First of all, it should be noted that the criminal liability for criminal offenses related to commercial secrecy applies in the vast majority of European Union countries, it shows that the impact of the Directive on criminal justice is extremely important. Unfortunately, as mentioned earlier, it too short time since expiring the deadline for transposition (implementing) of the Directive, therefore the effectiveness of the implementing measures of the Directive conclusions cannot be drawn at this moment. Below are specifying sources of protection for trade secrets of the state members:

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<sup>151</sup> Ramūnas Birštonas, Danguolė Klimkevičiūtė, Nijolė Janina Matulevičienė, Lina Mickienė, Jūratė Usonienė. *Intelektinės nuosavybės teisė (en. Intellectual property law)*. Vilnius: Mykolas Romeris University, 2011.

<i>Members states</i>	<i>Specific law on Trade Secrets</i>	<i>Unfair Competition Law</i>	<i>Competitions Law</i>	<i>IP law</i>	<i>Civil Code</i>	<i>Labour Law</i>	<i>Contract Law</i>	<i>Criminal Law</i>	<i>Common Law on Breach of Confidence</i>	<i>Other</i>
<i>Belgium</i>		X	X		X	X		X		
<i>Bulgaria</i>			X		X	X		X		X
<i>Czech Republic</i>					X	X		X		
<i>Denmark</i>			X					X		X
<i>Germany</i>		X			X			X		X
<i>Estonia</i>		X	X			X		X		X
<i>Ireland</i>			X				X		X	X
<i>Greece</i>		X	X	X	X	X		X		X
<i>Spain</i>		X	X	X		X		X		X
<i>France</i>			X	X	X	X		X		
<i>Croatia</i>		X	X			X		X		X
<i>Italy</i>			X	X	X			X		X
<i>Cyprus</i>			X				X	X		X
<i>Latvia</i>		X				X		X		X
<i>Lithuania</i>	X <sup>152</sup>	X	X		X	X		X		X
<i>Luxemburg</i>		X	X		X			X		
<i>Hungary</i>		X	X		X	X		X		X
<i>Malta</i>			X		X			X		
<i>Netherlands</i>			X		X			X		
<i>Austria</i>		X	X	X		X		X		X
<i>Poland</i>		X	X		X	X		X		X
<i>Portugal</i>				X		X		X		
<i>Romania</i>		X	X		X	X		X		X
<i>Slovenia</i>			X			X	X	X		X
<i>Slovakia</i>			X					X		X
<i>Finland</i>		X	X			X		X		X
<i>Sweden</i>	X		X					X		
<i>United Kingdom</i>			X				X		X	X

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<sup>152</sup> This Law did not mention in origin source: Lietuvos Respublikos komercinių paslapčių teisinės apsaugos įstatymas (en. Law on the Legal Protection of Commercial Secrets of the Republic of Lithuania). Register of legal acts: 8 May 2018, Nr. 7477; source: <https://e-seimas.lrs.lt/portal/legalAct/lt/TAD/86178ae24dfb11e88525a4bc7611b788?jfwid=-11gea3wdkd>

<sup>153</sup> The baseline of trade secrets litigation in the EU member states. European Union Intellectual Property Office: 2018; source: [https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document\\_library/observatory/documents/reports/2018\\_Baseline\\_of\\_Trade\\_Secrets\\_Litigations\\_in\\_EU\\_Member\\_States/2018\\_Baseline\\_of\\_Trade\\_Secrets\\_Litigations\\_in\\_EU\\_Member\\_States\\_EN.pdf](https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/reports/2018_Baseline_of_Trade_Secrets_Litigations_in_EU_Member_States/2018_Baseline_of_Trade_Secrets_Litigations_in_EU_Member_States_EN.pdf)

The data in the table shows that the protection of commercial secrets requires a systematic approach. Different aspects of the protection of commercial secrets are set in the legislation of different branches of law. This may lead to a risk of inconsistency (contradiction) of the law, inter alia, the formation of a different court practice. In this context, the intention of the EU institutions to harmonize legal regulation in the area under consideration is particularly welcome.

Some Member States, such as the Republic of Lithuania and Sweden, at the implementation of the Directive, have developed the Specific Law on Trade Secrets. The administered two fundamental differences between the two countries in the implementation of the Directive way is that:

(i) In the past, the Republic of Lithuania did not have a single legal act in its national law for sole protection of commercial secret purposes, and in the case of Sweden they had such legal act (Act on the Protection of Trade Secrets which entered into force on July 1, 2018, and repealed the Act on the Protection of Trade Secrets (1990:409)). In essence, this could have enabled Sweden to assess more effectively the practical impact of the *lex specialis* sanctions and definitions.

(ii) Sweden Specific law on Trade Secrets has criminal law provisions. *“The new act also introduces criminal sanctions against those who use or disclose a trade secret to which they have had authorized access. Under the previous law, a prerequisite for criminal sanctions was that someone had obtained trade secrets to which they were not authorized access. The new criminal sanctions are independent from the directive.”*<sup>154</sup>

In this context, it should be emphasized that the implementation of the Directive depend on differences in legal systems of the member state. In that case, welcome that the criminal law provisions are in Swedish special protection of commercial secrets because it makes it easier to systematically apply the protection of commercial (trade) secrets, therefore easier to deal with issues of dissociation of liabilities (civil, administrative, criminal). However, in the legal system of the Republic of Lithuania, such a method of legal regulation is impossible, because, according to the Constitutional doctrine of the Republic of Lithuania (the case law of the Constitutional Court of the Republic of Lithuania), offences and their elements must be determined exclusively at the national criminal legal act, i.e. only in the Criminal Code of the Republic of Lithuania.

The abovementioned circumstances determine the disadvantages of the Directive because of its possible inflexibility with regard to the legal systems of the Member States. Having analyzed the text of the directive, there is a lack of attention to criminal

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<sup>154</sup> Valea AB “New Act on the Protection of Trade Secrets”. Lexology. May 29 2018. <https://www.lexology.com/library/detail.aspx?g=6d6a7ef5-a085-4fcc-b9f0-f3bd5edc1979>

justice, although it is obvious from the above table that it is relevant to an absolute majority of Member States. In the meantime, if the Directive were to contain any guidelines on the criminalization of criminal offenses related to commercial secrets, it would appear that certainly contribute to a more effective harmonization process. Despite specified, it should be noted that the Directive contains specific definitions (e. g. Article 3, 4 of Directive) which can not be ignored by criminal justice, because, in accordance with the fundamental principles of the EU, domestic law must be interpreted in the light of the Directive<sup>155</sup>.

To conclude, it should be noted the importance of the problem of dissociation of responsibilities (civil, administrative, criminal) between different types of liabilities and solution to this problem. Subjects of business are increasingly choosing to resolve business disputes through criminal law because it is simply cheaper: there is no stamp duty, data are being searched by law enforcement, there is no need to pay for forensics, etc. This tendency should be considered negative as they distort the application of criminal law as *ultima ratio* measure and complicate law enforcement work. Only high-quality and complex legislation at both EU and national level can be expected to manage this kind of legal abuse.

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<sup>155</sup> Unfortunately, after the expiry of the deadline for the implementing the Directive, the Supreme Court of the Republic of Lithuania has not taken decisions regarding the topic under analysis.



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